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No. 84-5555

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

LARRY GENE HEATH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENT

CHARLES A. GRADDICK
Alabama Attorney General

WILLIAM D. LITTLE *
Alabama Assistant
Attorney General
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150
Counsel for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Is the dual sovereignty doctrine applicable to successive prosecutions by two states for the same criminal conduct?

2. Has this Court's application of the dual sovereignty doctrine always turned solely on whether the two governments are sovereigns in the sense that each derives its power to prosecute from a source independent of the other?

3. Even if this Court were to adopt Petitioner's unprecedented comparison of interests test, should the Court bar Alabama's prosecution of Petitioner where Alabama has interests in the prosecution which are different from Georgia's and which were not satisfied by Petitioner's prosecution in Georgia.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported in *Ex parte Heath*, 455 So.2d 905 (Ala. 1984), and is set forth in the Joint Appendix, p. 93. Also set forth in the Joint Appendix, p. 78, is the earlier opinion of the Court of Criminal Appeals of Alabama, which is reported in *Heath v. State*, 455 So.2d 898 (Ala. Crim. App. 1983).

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Alabama was entered on July 6, 1984. *Ex parte Heath*, 455 So.2d 905 (Ala. 1984). The petition for writ of certiorari was

timely filed within the extended time for filing on October 4, 1984.

However, jurisdiction existed only as to Issue II of the petition and the additional question this Court added. No jurisdiction existed as to the three other issues raised in the petition, because they were neither raised nor considered in the court below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions involved are set out in the Appendix:

United States Constitution, Fifth Amendment

Ala. Code, § 13A-5-39(1)

Ala. Code, § 13A-5-40

Ala. Code, § 13A-6-2

Ala. Code, § 15-2-3

Ga. Code, § 26-1101

STATEMENT OF THE CASE

Statement Of The Facts

Sometime during the late summer of 1981 Petitioner, a resident of Russell County, Alabama,[1] decided to have his then-pregnant wife, Rebecca Heath, killed (R. 543).[2] At the time Petitioner was involved in an affair with Denise Lambert, a resident of nearby Columbus, Georgia;[3] the

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[1] Russell County is located across the Chattahoochee River from the State of Georgia.

[2] References to the trial record, including transcript, will begin with "R.". References to the Joint Appendix will begin "J.A.".

[3] Columbus is located directly across the Chattahoochee River from Phenix City, Alabama, which is in turn located in Russell County, Alabama.

two were secretly engaged to be married (R. 575). After one failed attempt to arrange for the killing (R. 543), Petitioner, through his brother Jerry Heath, met with Charles "Slim" Owens in Owens's apartment in Columbus to discuss the killing (R. 544). Owens agreed to do the job for two thousand dollars, four hundred to be paid beforehand and the remaining sixteen hundred dollars to be paid afterwards (R. 549-550). The money used to pay for Rebecca Heath's death came from a finance company loan obtained over Rebecca Heath's signature.[4]

Several days after Petitioner went to Owens's apartment, Owens and another man met Petitioner outside Petitioner's office. The men were driving a Ford Mustang. Petitioner gave the other man one hundred dollars, and the next day brought him a .357 Magnum pistol to be used in abducting Rebecca Heath (R. 544). Petitioner also told the two men at this time that his wife would be driving him to work the next day, and instructed them to force their way into Rebecca Heath's car when she stopped at a certain corner (R. 544). Petitioner also supplied the men with three hundred dollars to be used to buy a car (R. 544).

Several days passed and nothing happened. Petitioner attempted to get in touch with Owens but was unable to do so (R. 545). When Petitioner reached Owens by telephone, he was told that the other man had disap-

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[4] The loan, for $2500.00, was applied for on August 12, 1981, and approved on August 13, 1981 (R. 568-570). Rebecca Heath was killed on August 31, 1981. Petitioner denied that the loan was obtained in order to pay his wife's killers; he admitted though that the money was used for that purpose (R. 704-705). Moreover, shortly before obtaining the loan Petitioner contacted the finance company twice about obtaining a loan but backed out both times when the finance company insisted on Petitioner's wife also signing for the loan (R. 570-571).

peared, but that a third man, Gregory Hughes Lumpkin,[5] would assist Owens in the killing. Lumpkin was the owner of the Ford Mustang (R. 545).

Around 2:00 a.m. on Monday, August 31, 1981, Owens called Petitioner at his home and told him that he and Lumpkin were ready (R. 545). According to the plan, Owens and Lumpkin were to abduct Rebecca Heath using the Heaths' car, a green Oldsmobile; at an appointed spot the car's steering wheel was to be secured with a strand of wire and a brick was to be placed on the accelerator of the car, and the Oldsmobile was to be run into a creek at high speed with Rebecca Heath inside to make it appear as though her death were an accident (R. 545-546). Petitioner, having placed the brick and the wire in the Oldsmobile (R. 545), left his and the victim's home, in Alabama, around 6:00 a.m. on August 31st and drove the Oldsmobile to Owens's apartment in Georgia to talk with Owens about the plan (R. 545). Then Petitioner drove to Denise Lambert's apartment to await a telephone call from Owens (R. 545). After Owens called around 7:15 or 7:30 a.m. Petitioner drove in the Oldsmobile, with Denise Lambert following in her pickup truck, to a gasoline station where he met Owens and Lumpkin, who were in the Mustang, just before 8:00 a.m. (R. 545). Petitioner turned the Oldsmobile over to one of the men and he got into Denise Lambert's truck (R. 545).

Then the two hired killers, driving the Oldsmobile and the Mustang, followed Petitioner and Denise Lambert to Petitioner's house on Sunderlan Drive in Russell County, Alabama (R. 545). When they arrived at Sunderlan Drive, Lumpkin, driving the Mustang, pulled up beside the truck, and Petitioner pointed out his house to the men and told them that they would have to get his wife from inside the house (R. 546.) Petitioner had left the

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[5] Lumpkin's name was not know to Petitioner, but he was a codefendant in the Georgia indictment (J.A. at 4).

house unlocked for this purpose and had also given Owens and Lumpkin the key to the house (R. 546). Petitioner's son Hamilton, then approximately two years old, was apparently in the truck with him when Petitioner gave Owens and Lumpkin the order to go in and get the boy's mother.[6] Petitioner, Hamilton, and Denise Lambert then drove to Lambert's apartment, and Petitioner later went to work (R. 546). Meanwhile, Rebecca Heath, a resident of Alabama, was abducted from her home in Alabama.

Around 9:00 a.m. on the same day, August 31, 1981, a Ford Mustang was seen in Troup County, Georgia, driving at a high rate of speed away from a spot where a green Oldsmobile was parked thirty to forty feet off the road (R. 334-336).[7] At 11:05 a.m. on the same day the body of Rebecca Heath, then nine months pregnant, was discovered inside the green Oldsmobile in Troup County (R. 340-341). A brick was found on the front floorboard of the Oldsmobile (R. 353), and a section of heavy electrical wire, about four to five feet long, was found on the back floorboard (R. 440). The cause of death was a gunshot wound to the right eye (R. 323). During the course of the autopsy the body of an eight pound, two ounce unborn baby boy was removed from Rebecca Heath's uterus; the baby was perfectly normal and under normal circumstances would have been delivered alive (R. 323).[8]

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[6] Petitioner stated in his confession that Hamilton was with him when Denise Lambert dropped him off at a service station afterwards (R. 546). Hamilton's grandfather, who now has custody of the boy, reported that Hamilton has had frequent nightmares during which he wakes up crying, "let me out of this truck" (R. 829). The boy has been under the care of a psychiatrist (R. 829).

[7] The spot in Troup County where the cars were seen is approximately fifty miles from Phenix City, Alabama (J.A. at 31).

[8] On August 26, 1981, five days before her death, Rebecca Heath paid $1,500.00 by check in advance to a group of doctors for the

On September 4, 1981, Petitioner was arrested and, after having been informed of his *Miranda* rights and having voluntarily waived those rights, gave a full confession admitting his involvement in his wife's kidnapping and murder (R. 458-483, 536-546). Petitioner claimed that he killed his wife because she would not give him a divorce on his terms and because he would be unable to obtain custody of his son Hamilton (R. 546-547, 829). However, several days later a number of insurance policies on the life of Rebecca Heath were found in Petitioner's luggage (R. 477). A total of $120,689.53 in life insurance proceeds was paid on account of the death of Rebecca Heath (R. 329);[9] Petitioner was the beneficiary on at least some and perhaps all of the policies (R. 331).

Proceedings Below

In November 1981 Petitioner was indicted by the Grand Jury of Troup County, Georgia, for the offense of malice murder. The indictment read as follows:

> . . . LARRY GENE HEATH [et al.] on the date of August 31, 1981, in the county aforesaid, did then and there unlawfully and with malice aforethought cause the death of Rebecca McQuire Heath, a human being, by shooting her with a gun, a deadly weapon.

(J.A. at 4). Contrary to Petitioner's assertion (Petitioner's brief, p. 2), the Georgia indictment was not the result of a joint investigation. While there was cooperation among the officials, Alabama's investigation was separate from Georgia's (R. 387-388).

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delivery of her baby. The check was written on a checking account she held jointly with Petitioner. Sometime after August 26th the payment on this check was stopped (R. 576-579).

[9] Petitioner initially told investigators that to his knowledge there was only one policy on Rebecca Heath's life, in the amount of $20,000.00 (R. 435).

On February 10, 1982, Petitioner entered a plea of guilty to the Troup County murder charge and received a sentence of life imprisonment (J.A. at 6).

On May 5, 1982, Petitioner was indicted by the Grand Jury of Russell County, Alabama, for the capital offense of murder during the course of a kidnapping in the first degree, as defined in Ala. Code, § 13A-5-40(a)(1). This indictment read as follows:

> The Grand Jury of said County charge that before the finding of this Indictment Larry Gene Heath did intentionally cause the death of Rebecca Heath, by shooting her with a gun, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or attempt to abduct, Rebecca Heath with intent to inflict physical injury upon her, in violation of § 13A-5-40(a)(1) of the Code of Alabama 1975, as amended, against the peace and dignity of the State of Alabama.

(J.A. at 7). Alabama's capital offense of kidnapping/murder is materially different from Georgia's capital offense of malice murder.[10]

On November 2, 1982, Petitioner's attorneys filed on his behalf a plea of autrefois convict and a plea of former jeopardy, both of which raised the issue of whether Petitioner's conviction and sentence in Georgia barred on double jeopardy grounds his prosecution in Alabama.

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[10] Alabama law no longer includes the element of malice in any type of homicide crime. *See*, Commentary to Ala. Code, § 13A-6-2. The closest counterpart in Alabama law to Georgia's capital offense of malice murder is Alabama's § 13A-6-2(a)(1) non-capital offense of intentional murder. Murder during a kidnapping in the first degree is a different offense under Alabama law, and is a capital offense. Section 13A-5-40(a)(1). The kidnapping in the first degree component is an essential element of the crime without which there can be no conviction and no life without parole or death sentence under § 13A-5-40(a)(1). *See, Ex parte Baldwin*, 372 So.2d 32, 33 (Ala. 1979); *see, Beverly v. State*, 439 So.2d 758, 762 (Ala. Crim. App.), *cert. denied*, No. 82-987 (Ala. 1983) (both decided under earlier version of Alabama's capital murder statute).

(J.A. at 8-11). The trial court, after a hearing and briefing by Petitioner's attorney, held that, assuming arguendo that the crimes in Georgia and Alabama were legally identical or that the Georgia offense could be considered a lesser included offense of the Alabama offense, double jeopardy did not bar prosecutions by two different states for the same act (J.A. at 12-14). The same two pleas were reasserted at trial and again rejected (J.A. at 54-57).

Petitioner was convicted by the jury on January 12, 1983, of murder during a kidnapping in the first degree (J.A. at 63). Subsequently a sentence hearing was held before the jury; after hearing the evidence and considering the aggravating and mitigating circumstances the jury made a sentence recommendation of death by a vote of twelve to zero (J.A. at 64). Pursuant to Alabama law a second sentence hearing was held before the trial court; after weighing aggravating and mitigating circumstances the trial court found that the aggravating circumstances outweighed the mitigating circumstances and, following the jury's recommendation, sentenced Petitioner to death on February 10, 1983 (J.A. at 69-74).

Appeal was automatic to the Alabama Court of Criminal Appeals. On July 5, 1983, that court affirmed Petitioner's conviction and death sentence, holding that the dual sovereignty doctrine applied to prosecutions by two states (J.A. at 78-90). An application for rehearing was overruled.

On August 10, 1983, Petitioner filed a petition for writ of certiorari in the Supreme Court of Alabama (J.A. at 91-92), which was automatically granted pursuant to Alabama law. On July 6, 1984, the Supreme Court of Alabama affirmed Petitioner's conviction and sentence and the decision of the Court of Criminal Appeals, holding that Alabama and Georgia were separate sovereigns and that the dual sovereignty doctrine thus allowed the two prosecutions of Petitioner (J.A. at 93-96).

SUMMARY OF THE ARGUMENT

Under the dual sovereignty doctrine as firmly established by this Court the fundamental question is whether each government derives its power to prosecute from a source independent of the other government. If so, the governments are separate sovereigns within the meaning of the dual sovereignty doctrine, and a violation of the law of each is a separate offense for the purpose of the Double Jeopardy Clause. Based on this analysis the Court has previously decided that a state and the federal government are separate sovereigns because each derives its authority to prosecute from its own constitution. Because states derive their authority to prosecute from their individual constitutions they are separate sovereigns in relation to each other; thus the dual sovereignty doctrine applies to successive state prosecutions, and such prosecutions do not violate double jeopardy. Alabama's prosecution of Petitioner did not, therefore, violate double jeopardy.

The dual sovereignty doctrine, as developed by this Court, has never involved an analysis and comparison of the interests of the prosecuting governments. The adoption of this type of analysis in the case of successive state prosecutions would be inconsistent with settled law regarding prosecutions by other governments. A test based on comparison of interests would be very problematical in its application, and would inevitably lead to confusion among law enforcement officials. The adoption of a test based on interests in the area of state/state prosecutions would also undermine the well-settled rule in the area of federal/state prosecutions.

Even if the unprecedented comparison of interests test Petitioner espouses were adopted, Alabama's prosecution of Petitioner would still not violate double jeopardy principles. The Alabama statute under which Petitioner was prosecuted provided a minimum punishment which was greater than the life sentence Petitioner received in Geor-

gia. In addition, by seeking the death penalty where Georgia did not, Alabama expressed its view that Petitioner's crime was more serious than Georgia considered it. Therefore Alabama's interests were different from Georgia's and were not served by Georgia's prosecution.

ARGUMENT

I. THE DUAL SOVEREIGNTY DOCTRINE IS APPLICABLE TO SUCCESSIVE PROSECUTIONS BY TWO STATES FOR THE SAME CRIMINAL ACT, BECAUSE A STATE, DERIVING ITS POWER TO PROSECUTE FROM ITS OWN CONSTITUTION, IS A SOVEREIGN WITHIN THE MEANING OF THE DUAL SOVEREIGNTY DOCTRINE.

A. Two Governments Are Separate Sovereigns, And The Dual Sovereignty Doctrine Is Therefore Applicable, Where Each Derives Its Power To Prosecute From A Source Independent Of The Other Government.

The Double Jeopardy Clause of the Fifth Amendment provides as follows:

> . . . ; nor shall any person be subject for the *same offense* to be twice put in jeopardy of life or limb; . . . .

(emphasis added). In *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), this Court considered the question of whether one act may constitute two different offenses, within the meaning of the Double Jeopardy Clause, where the act violates the law of two different sovereigns. In determining that such a situation would not constitute double jeopardy, this Court stated as follows:

> The same act may be an offense or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same of-

> fense; but only that by one act he has committed two offenses, for each of which he is justly punishable.

55 U.S. at 20. This rule was approved in subsequent cases. *United States v. Cruikshank*, 92 U.S. 542, 550-551 (1875); *Ex parte Siebold*, 100 U.S. 371, 389-391 (1879); *Cross v. North Carolina*, 132 U.S. 131, 139 (1889); *Pettibone v. United States*, 148 U.S. 197, 209 (1893); *Crossley v. California*, 168 U.S. 640, 641 (1898); *Southern Railway Co. v. Railroad Commission of Indiana*, 236 U.S. 439, 445 (1915); *Gilbert v. Minnesota*, 254 U.S. 325, 330 (1920); *McKelvey v. United States*, 260 U.S. 353, 358-359 (1922). It emerged as clear constitutional doctrine in *United States v. Lanza*, 260 U.S. 377 (1922).[11] In *Lanza* the defendant sought to use a prior state conviction to bar a federal prosecution based on the same acts. The Court, relying on *Moore*, held that double jeopardy did not prevent the federal prosecution.

> [The states'] laws derive their force . . . from the power originally belonging to the states, preserved to them by the 10th Amendment, ...
>
> * * * *
>
> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government, in determining what shall be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each. . . . Here the same act was an offense against the state of Washington, because a

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[11] Petitioner describes the dual sovereignty doctrine as "an exception to the normal rules of double jeopardy" (Petitioner's brief, p. 22). In *United States v. Wheeler*, 435 U.S. 313, 330 (1978), however, the Court characterized the doctrine as arising from the "very words of the Double Jeopardy Clause."

> violation of its law, and also an offense against the United States under the National Prohibition Act. *The defendants thus committed two different offenses by the same act, and a conviction by the court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy.*

260 U.S. at 381-382 (emphasis added). The holding of *Lanza*, that double jeopardy does not apply where there are state and federal prosecutions, was reaffirmed in *Abbate v. United States*, 359 U.S. 187, 195 (1959).

Since *Abbate* the Court has twice considered whether the dual sovereignty doctrine applied to prosecutions for the same act by two governments. In *Waller v. Florida*, 397 U.S. 387 (1970), the Court held that the dual sovereignty doctrine did not apply to prosecutions by a Florida municipality and the State of Florida, because under Florida law municipalities are creations of the state; thus municipalities and the state derive their power from the same source and are not separate sovereigns. 397 U.S. at 392-394. That the dual sovereignty doctrine turned on whether the two governments derived their prosecutorial power from the same source was further underscored in *United States v. Wheeler*, 435 U.S. 313 (1978). In *Wheeler* the Court held that where the power to prosecute Indian tribal offenders was a part of inherent tribal authority, rather than an aspect of the sovereignty of the federal government delegated to the tribe by Congress, the tribe was a separate sovereign under the dual sovereignty doctrine. As a result, and because of the dual sovereignty doctrine, the Double Jeopardy Clause did not bar a prosecution by the federal government where the defendant had already been prosecuted for a lesser included offense in a tribal court.[12]

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[12] Petitioner asserts that the dual sovereignty doctrine arose in pre-civil war times to resolve the state and federal conflicts of that period. This fails to explain the continuation of the doctrine

In the cases addressing the state/federal situation, *Moore*, *Lanza* and *Abbate*, this Court recognized that because the state and federal governments had separate sources of power to prosecute they were separate sovereigns in relation to each other and therefore could successively prosecute the same act without violating the Double Jeopardy Clause. In two cases involving other governmental entities, *Waller* and *Wheeler*, this Court closely examined the relationship between the entities to determine whether they derived their power from the same source. Most importantly, both classes of cases evidenced a single, consistent approach. In all five cases the application of the dual sovereignty doctrine depended solely on whether the two governments actually derived their power to prosecute from separate sources and were thus separate sovereigns. If they were separate sovereigns then the violation of the law of each was a separate offense, and the Double Jeopardy Clause was not violated.[13] In no area of constitutional law have this Court's decisions reflected a more consistent, straightforward analytical approach.

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in *Lanza* (1922) and *Abbate* (1959), and the application of the dual sovereignty doctrine in *Wheeler*, where there was no question of federalism. Petitioner also points out that *Abbate* was decided prior to the Fifth Amendment's being held applicable to the states; this is irrelevant because in *Abbate* the second prosecuting party was the federal government, to whom the Fifth Amendment was clearly applicable.

[13] Both before and after *Lanza* the Court decided in *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), and *Grafton v. United States*, 206 U.S. 333 (1907), that a territorial government and the federal government were not separate sovereigns because a territory simply exercised authority granted to it by the federal government. The same, of course, cannot be said about two states.

B. This Court Has Never Applied The Dual Sovereignty Doctrine Based On Whether The Two Prosecutions Served Different Interests. Instead The Doctrine Has Always Been Applied Based On Whether The Two Governments Involved Were Separate Sovereigns Deriving Their Power To Prosecute From Different Sources.

Petitioner argues at length that the dual sovereignty doctrine should only be applied where the governments involved are pursuing diverse interests. This view of dual sovereignty should be rejected because it is inconsistent with the specific holdings of all of this Court's dual sovereignty decisions.

The foundation of the dual sovereignty doctrine is the principle that where one act violates the laws of two different sovereigns two different offenses are committed. *United States v. Lanza*, 260 U.S. at 382; *Moore v. Illinois*, 55 U.S. at 20. This principle stems from the common law conception of a crime as an offense against the sovereignty of government. Grant, *The Lanza Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309, 1310, 1316 (1932). The important question in the dual sovereignty cases has always been whether the two governments were actually separate sovereigns; in other words, whether they derived their power to prosecute from different sources. *United States v. Wheeler*, 435 U.S. at 320. Based on this definition of sovereignty this Court has held that the federal government and the states are separate sovereigns in relation to each other. *Abbate v. United States*, *supra*; *United States v. Lanza*, *supra*; *Moore v. Illinois*, *supra*. The Court has also held that because territorial governments derive their authority from the federal government and municipal governments derive their authority from state governments, these governmental entities are not sovereigns in relation to one another. *Waller v. Florida*, *supra*; *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264-265 (1937); *Grafton v. United States*, 206 U.S. 333, 353-355 (1907).

In its dual sovereignty cases the focus of this Court's analysis was on the concept of sovereignty, meaning that each government derives its power to prosecute from an independent source, and not on the various interests of the governments involved. This same analysis has consistently been applied by the lower federal courts in the dual sovereignty context. *See, E.g., United States v. NG*, 699 F.2d 63 (2nd Cir. 1983); *Pope v. Thone*, 671 F.2d 298 (8th Cir.), *cert. denied*, 457 U.S. 1140 (1982); *Delay v. United States*, 602 F.2d 173 (8th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *Brown v. United States*, 551 F.2d 619 (5th Cir. 1977). The so-called *Petite* policy, under which the local federal prosecutor must convince the United States Department of Justice of an unsatisfied federal interest after there has been a state prosecution, is not a rule of constitutional law. *United States v. NG, supra*; *Pope v. Thone, supra*; *see, Delay v. United States, supra*.[14]

Moreover, if an analysis of the interests involved had been the real basis for the dual sovereignty line of cases, then *United States v. Lanza, supra*, perhaps the leading case in this area of the law, would have been decided differently. In *Lanza* the defendant had been convicted in state court of manufacturing, transporting, and possessing liquor. 260 U.S. at 379. He was then indicted in federal court for manufacturing, transporting, and possessing the same liquor, and for possessing a still and materials for a still. 260 U.S. at 378. All of the federal charges were dismissed on the ground that prosecution of them would constitute double jeopardy. 260 U.S. at 379. This Court reversed, holding that because each government derived its power from a different source, the governments were separate sovereigns; thus the defendant's

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[14] Petitioner's recitation of various states that, by *statute or case law*, bar two prosecutions by different sovereigns in *some* cases (Petitioners brief, p. 18 n. 6) only serves to underscore that such rules are not of constitutional origin.

acts constituted separate offenses and double jeopardy did not apply. 260 U.S. at 381-382.

In *Lanza* the statutes were identical, with the exception of the additional charges in federal court of possessing a still and materials for a still. No different interests were noted by the Court. If a comparison of interests had been the basis of the Court's decision, the result in *Lanza* would have been different. The Court meant what it said in *Lanza*: where the sources of power are distinct, separate sovereigns are involved, and there is no violation of the Double Jeopardy Clause.

Petitioner claims that this Court has moved toward an analysis based on interests in its most recent decisions, *Waller* and *Wheeler*. The position taken by Petitioner is based on a fundamental misreading of those cases.

In *Waller* the defendant had, with others, removed a canvas mural from a wall in the St. Petersburg city hall and carried it through the streets. 397 U.S. at 388. When the defendant and the others were accosted by officers a scuffle resulted and the mural was damaged. *Id.* The defendant was charged by the City of St. Petersburg with destruction of city property and disorderly breach of the peace; he pleaded guilty to both charges. *Id.* Subsequently the defendant was charged by the State of Florida with grand larceny and convicted. *Id.* The Florida appellate court acknowledged that all charges were based on the same facts; assumed without holding that the municipal ordinances were lesser included offenses of the state crime; and held that even if the offenses were identical the municipal prosecutions were not a bar to the state prosecution. *Id.* at 389.

This Court reversed, holding that since a municipality shared its source of power with the state the municipality could not be considered a separate sovereign and the dual sovereignty doctrine was not applicable. *Id.* at 392-395. The Court limited its holding as follows:

> We decide only that the Florida courts were in error to the extent of holding that—'even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'

Id. at 395. In its disposition of *Waller* the Court was in no way suggesting that the second prosecution was barred because the interests at stake in both prosecutions were identical. Instead, in that part of the opinion Petitioner relies on, this Court was simply acknowledging the possibility that, under the facts of that case, a lower court could find that the offenses involved were not based on the same facts and that the municipal ordinances were not lesser included offenses of the state offense.

In *Wheeler* the Court, after extensively considering the nature and source of an Indian tribe's authority to prosecute, 435 U.S. at 322-330, determined that because this authority is not derived from the federal government, tribes are sovereigns in relation to the federal government. Prosecutions by a tribe and the federal government for the same offense are therefore permitted under the dual sovereignty doctrine. *Id.* at 329-333. At the end of the opinion this Court did note as a secondary matter that the tribal courts protect certain interests which might not be served by federal prosecutions. *Id.* at 331-332. The Court made plain, however, that the basis for its decision was the settled concept that the laws of two different sovereigns are distinct offenses for purposes of the Double Jeopardy Clause.

> In Bartkus v. Illinois, 359 U.S. 121 and Abbate v. United States, 359 U.S. 187 this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth

Amendment, 'subject [the defendant], for the same offence to be twice put in jeopardy':

> 'An offence, in its legal significance, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.' Moore v. Illinois, 14 How. 13, 19-20.

435 U.S. 316-317.

* * * *

Bartkus and Abbate rest on the basic structure of our federal system, in which States and the National Government are separate political communities. State and Federal Governments '[derive] power from different sources,' each from the organic law that established it. United States v. Lanza, 260 U.S. 377. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, and not that of the other.' Ibid.

435 U.S. at 320.

* * * *

The respondent contends that, despite the fact that successive tribal and federal prosecutions are not 'for the same offence,' the 'dual sovereignty' concept should be limited to successive state and federal prosecutions. But we cannot accept so restrictive a view of that concept, a view which, as has been noted, would require disregard of the very words of the Double Jeopardy Clause.

435 U.S. at 330. Thus the Court's holding in *Wheeler* expressly turned on the question of whether each government derived its power to prosecute from a source independent of the other governments, and not on any notion of interests.[15]

Because the position urged by Petitioner is so clearly contrary to the plain language of this Court's several decisions on dual sovereignty, Petitioner's argument is in reality an attack on this settled doctrine, despite Petitioner's disclaimer (Petitioner's brief, p. 34). If this Court were to hold that the application of the dual sovereignty doctrine to successive state prosecutions depends on a comparison of interests, this Court would undermine the well-established and expressly stated basis of the dual sovereignty doctrine in any context. Such a decision would subtract clarity from and destroy consistency in an important area of constitutional law.[16]

C. The Dual Sovereignty Doctrine Established By This Court Is Logically And Conceptually Sound.

At pages 31 through 35 of his brief Petitioner argues that the Court has not clearly and logically stated what is meant by "sovereignty" in the context of the dual sovereignty cases. In so doing Petitioner ignores the plain language of these cases.

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[15] At most it could be said that there are two independent holdings in *Wheeler*, both of which are of equal authority. *See, Union P.R. Co. v. Mason City and Ft. Dodge R. Co.*, 199 U.S. 160 (1905).

[16] Petitioner suggests that *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847) and *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850), were early cases which allowed two prosecutions only because different interests were involved. This Court, however, has interpreted these cases as being a part of the dual sovereignty line of cases which allows two prosecutions if separate sovereigns are involved. *Abbate v. United States*, 359 U.S. at 190-192; *United States v. Lanza*, 260 U.S. at 383; *Moore v. Illinois*, 55 U.S. (14 How.) at 20.

All of the Court's dual sovereignty cases have turned upon the answer to a single question—what is the ultimate source of power on which the respective prosecutions were based? If the Court found that the two governments derived this power from independent sources, then they were sovereigns in relation to each other within the meaning of the dual sovereignty doctrine. If, on the other hand, the power to prosecute emerged from the same source, the governments were not separate sovereigns and dual sovereignty did not apply. Thus in *Lanza*, *Abbate*, and *Wheeler*, the Court found that the power of each government to prosecute had its origin in a source distinct from the other government, whereas in *Waller*, *Shell Co.*, and *Grafton*, one government was in reality a creation of the other government and thus they shared the source of power. If there was any confusion about the basis for this Court's decisions it was put to rest in *Wheeler*.

> We think that the respondent and the Court of Appeals, in relying on federal control over Indian tribes, have misconceived the distinction between those cases in which the 'dual sovereignty' concept is applicable and those in which it is not. It is true that Territories are subject to the ultimate control of Congress, and cities to the control of the State which created them. But that fact was not relied upon as the basis for the decisions in Grafton, Shell Co., and Waller. What differentiated those cases from Bartkus and Abbate was not the extent of control exercised by one prosecuting authority over the other, but rather the ultimate source of the power under which the respective prosecutions were undertaken.

435 U.S. at 319-320.

Furthermore, the basis for the Court's decisions on dual sovereignty is logical. In *Waller*, *Shell Co.*, and *Grafton* this Court recognized that territories and municipalities owe their existence to, respectively, the federal

and state governments. Accordingly territories are but arms of the federal government, and municipalities are but arms of the state government; in each case the courts of a dependent government exercise the jurisdiction and authority of an independent government. Because the source of judicial power is the same an offense against the dependent government must be deemed an offense against the independent government.

The relationship between two sovereign governments is fundamentally different. A state derives its power to prosecute from its own constitution, *United States v. Wheeler*, 435 U.S. at 320, and its power to prosecute is recognized in the Tenth Amendment to the United States Constitution, *United States v. Lanza*, 260 U.S. at 381-382. The federal government derives its authority to prosecute from the federal constitution. *United States v. Wheeler*, 435 U.S. at 320. The authority of Indian tribes to prosecute is their "primeval sovereignty," *United States v. Wheeler*, 435 U.S. at 328, which, until Congress strips away this authority, makes the tribes sovereign for the purposes of the dual sovereignty doctrine. *Id.* One criminal act can logically be and has consistently been deemed two offenses under double jeopardy where it violates the duty owed to two different sources of power, or sovereigns. As was previously mentioned, this is consistent with the common law idea of crime as an offense against the sovereignty of government. Grant, *The Lanza Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309, 1310, 1316 (1932).

Petitioner argues on pp. 33-34 of his brief that this Court's distinction between states and territories for the purposes of the dual sovereignty doctrine is unreasonable. His argument ignores the theoretical basis of our United States. The states which existed before the adoption of the Federal Constitution originally possessed all of the attributes of sovereignty, and they still retain

those attributes, except as they have been surrendered by the formation of the Constitution and the Amendments thereto. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867). New states, upon their admission to the Union, become invested with equal rights and are subject only to the same restrictions as the original states. *Id.*

Moreover, the conclusions reached in the dual sovereignty cases concerning states, territories, and Indian tribes are consistent with other declarations of this Court. Regarding states, this Court has recognized that each state is endowed with all of the functions essential to a separate and independent existence. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869). Thus the states are sovereign within their own limits and foreign to each other. *Bank of the United States v. Daniel*, 37 U.S. (12 Pet.) 32 (1838). One of the sovereign interests of a state is the exercise of sovereign power over the individuals and entities within its jurisdiction, including the power to create and enforce a criminal code. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). The power to punish is a mark of sovereignty. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

As pertains to Indian tribes the Court has stated that tribes are unique aggregations possessing attributes of sovereignty, *United States v. Mazurie*, 419 U.S. 544, 557 (1975), with the power of regulating their internal and societal relations. *McClanahan v. Arizona State Tax Com.*, 411 U.S. 164, 173 (1973).

A territory, on the other hand, owes its existence to the United States, and its judicial tribunals exert all their power by authority of the United States. *Puerto Rico v. Shell Co.*, 302 U.S. at 265. Thus the dual sovereignty theory, as applied, is consistent with the attributes of sovereignty previously recognized by the Court.

D. The Application Of The Dual Sovereignty Doctrine Has Not Been And Should Not Be Limited To Governments Of Overlapping Territorial Jurisdiction.

Petitioner suggests on p. 36 of his brief that the dual sovereignty doctrine should be limited to those situations where two sovereigns with overlapping territorial jurisdiction both seek to try a defendant for one criminal act which violates the law of each. This doctrine, as consistently applied in *Moore*, *Lanza*, *Abbate*, and *Wheeler*, admits no such limitation. As has been repeatedly stated above, the crucial question in all of these cases is whether the two governments derive their power to prosecute from the same source. If so, then they are sovereigns within the meaning of the dual sovereignty doctrine. If, on the other hand, the two governments have the same source of power to prosecute, then they are not sovereigns and double jeopardy bars the second prosecution. In none of the cases in which the dual sovereignty doctrine has been considered, neither those in which the doctrine has been applied, *Moore*, *Lanza*, *Abbate*, and *Wheeler*, nor those in which the dual sovereignty doctrine was found to be inapplicable, *Grafton*, *Shell Co.*, and *Waller*, has the nature of the governments' jurisdiction been considered important.

Petitioner's argument that the possibility of intergovernmental interference is less in the state/state context than in the federal/state context is simply for the same reasons irrelevant to the test for sovereignty established by the Court. Moreover, even if the possibility of intergovernmental interference were a consideration, the possibility of conflicts arising out of prosecutions among the fifty states, most of which border two or more other states, is easily as great as if not greater than the possibility of interference between an Indian tribe and the federal government, a situation to which the dual sovereignty doctrine is applicable under *Wheeler*.

Because the fundamental question in the application of the dual sovereignty doctrine is whether the governments are in fact separate sovereigns, the doctrine should apply whenever two sovereigns have concurrent subject matter jurisdiction over the same criminal act irrespective of whether their territorial jurisdictions overlap.

E. Because States Derive Their Authority To Prosecute From Independent Sources, They Are Sovereigns Within The Meaning Of The Dual Sovereignty Doctrine, And Successive Prosecutions By States For The Same Criminal Act Are Not Barred By Double Jeopardy.

It has been shown, *supra*, that the application of the dual sovereignty doctrine depends on whether the governments involved derive their power to prosecute from different sources. *United States v. Wheeler*, 435 U.S. at 319-320. If they do, then they are separate sovereigns, and the dual sovereignty doctrine applies to allow successive prosecutions by the governments for the same criminal act. *Id.* With this question as the focus of analysis it has been consistently held that states are sovereigns in relation to the federal government, *United States v. Lanza*, 260 U.S. at 382; *Abbate v. United States*, 359 U.S. at 189-195, because states derive their authority to prosecute from their own constitutions. *United States v. Wheeler*, 435 U.S. at 320.

With the holdings of *Lanza*, *Abbate*, and *Wheeler* together forming the standard by which to judge prosecutions by other pairs of governments, it is simply irrefutable that the dual sovereignty doctrine applies to successive prosecutions by two states. Each state here, Alabama and Georgia, derives its power to prosecute from its own constitution; *United States v. Wheeler*, 435 U.S. at 320; thus neither of these states derives its authority to prosecute from the other. Alabama and Georgia, and any other states, are therefore separate sovereigns, and under the dual sovereignty doctrine successive prosecutions by

them, or by any other states, is not barred by double jeopardy. *Wiley v. Altman*, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E.2d 371 (N.Y. App. 1981); *State v. James*, 203 Md. 113, 100 A.2d 12 (1953); *People v. Walker*, 123 Cal. App. 3d 981, 177 Cal. Rptr. 147 (1981); *Hernandez v. State*, 397 So.2d 715 (Fla. App. 1981); *State v. Brown*, 441 N.E.2d 1126 (Ohio App. 1981); *State v. Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981); *State v. Glover*, 500 S.W.2d 271 (Mo. App. 1973); *see*, *Goldsmith v. Cheney*, 447 F.2d 624, 628 n. 3 (10th Cir. 1971).[17]

In *Wheeler* this Court made clear that the dual sovereignty doctrine is applicable to cases beyond the federal/state context where, under the doctrine established in *Moore*, *Lanza*, and *Abbate*, the prosecuting governments are in fact separate sovereigns. The Court in *Wheeler* recognized the sovereign status of an Indian tribe whose right to prosecute could at any time be eliminated by Congress. There is no logical reason not to extend the dual sovereignty doctrine to states, whose power to prosecute, arising from their own constitutions, is recognized by the 10th Amendment. *United States v. Wheeler*, 435 U.S. at 320. Because the dual sovereignty doctrine must be applied to successive state prosecutions, Alabama's prosecution of Petitioner is not barred by double jeopardy.

F. By Adopting The Interest Test Urged By Petitioner The Court Would Move From A Definite And Readily Applicable Doctrine To One Fraught With Uncertainty And Confusion.

As has been demonstrated *supra*, the Court in all of its dual sovereignty decisions has applied an analysis

[17] At page 20 of his brief Petitioner suggests that in *State v. Straw*, *supra*, the Tennessee court only allowed a second prosecution because the defendant received a light sentence in another state. While the Tennessee court mentioned the light sentence, it held that the dual sovereignty doctrine applied to all successive state prosecutions and therefore that the Fifth Amendment did not bar the second prosecution.

based on the concept of sovereignty which is inconsistent, both in substance and in result, with the interest test suggested by Petitioner. For that reason alone this Court should reject Petitioner's argument. There are, however, practical reasons for this Court to refuse to apply an interest-based analysis in the state/state context.

Petitioner argues on p. 37 of his brief that the application of an interest-based analysis to prosecutions between two states will usually result in the second prosecution being prohibited because "the social interests at stake will virtually always be satisfied by a single prosecution of a particular crime." A short inquiry into the nature of any comparison of interests will illustrate that the matter is far more problematic than Petitioner suggests.

Initially it is necessary to consider what questions would be involved in any comparison of interests. Interests, according to Petitioner, are reasons for the prosecution.[18] Petitioner speaks also of interests being served or satisfied.[19] Thus any comparison of interests would involve at least two questions (1) What interest is protected by the law of each state? and (2) Would the interest of the second state be sufficiently served by the first state's prosecution?

Consider the question of what interest is involved in a prosecution. In a very real sense, each state has an interest in all its prosecutions which is essentially different from that of any other state—the preservation of its own peace and dignity. *See, United States v. Lanza*, 260 U.S. at 382. No state can act for another in protecting this interest. In a very basic sense therefore the assertion of concurrent interests is an illusion.

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[18] At page 36 of his brief Petitioner argues that a state's interest in prosecution is the protection of "the safety of citizens, their property and the public morals."

[19] Petitioner's brief, pp. 37 and 39.

To the extent that a more specific inquiry into interests is required, this will sometimes be difficult or impossible. While in many cases the interest, in the sense of the purpose for the statute, will be obvious from a reading of it, in other cases the intent may not be so clear. Published legislative reports may well reveal legislative purposes, but these are seldom available for state government.[20] Discovering a particular state's exact interest may thus be an unsure endeavor.

Even if a state's interest can be learned, deciding whether one state's interest is satisfied by another state's prosecution is more difficult. First it must be determined what is meant by the question itself. Petitioner seems to say that where the states' interests are identical one state's prosecution will always serve another state's interest regardless of a difference in the punishment that could be imposed.[21] Yet it cannot be said that interests of a state are satisfied where the defendant received a significantly lighter sentence for his crime in another state. Suppose a defendant commits a particular type of murder on the border of two states in such a way that both states have jurisdiction, as in Petitioner's case. The first state to prosecute has no death penalty whereas the second state does. Both states have recognized a social interest in prohibiting murders by punishing those who commit them; the second state has indicated that this crime is one which may deserve this penalty "unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), while the first state has in effect said that no crime deserves such a penalty. Would the

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[20] With the exception of legislative copies of bills and legislative journals (usually containing only names and dates), very few states publish prepassage materials comparable to the documents available at the federal level. Foster & Boast, *Subject Compilations of State Laws*, 8 n. 5 (Greenwood Press 1981).

[21] Petitioner's brief, p. 37, arguing against repeated prosecution to obtain greater punishment.

second state's interest, which involves not only its prohibition of murder but also its decision on punishment, be satisfied by the first state's prosecution? Definitely not.[22]

If it is accepted that a state's interest may not be served by a lesser sentence than the state would have imposed, then the matter becomes more complicated. Suppose two adjoining states, A and B, have identically worded statutes prohibiting conspiracy to distribute marijuana, a crime which could easily extend to two or more states. In A this crime carries a penalty of from one to ten years in prison; in B, less tolerant of marijuana, the term is ten years to life. A defendant is prosecuted in A and receives a 5-year sentence. Is B's interest served? Obviously not, because the defendant would have received at least five years more in B. But what if A had given him ten years? He could receive many more years in B, or he could receive the identical sentence. Is B's interest in the *possibility* of a greater sentence a sufficient interest to allow prosecution? What if the different sentence ranges are instead one to twenty years for A versus ten to forty years for B, and the defendant receives a twenty year sentence in A. Prosecution by B might result in a much longer sentence, but it might instead result in a sentence only less than or equal to that imposed by A, making B's sentence in effect a nullity. Should a court find that B's chance of imposing a longer sentence is counterbalanced by the possibility of B obtaining a sentence only less than or equal to the sentence imposed by A, and thus that by the law of averages B's interest really equals zero? Should statistics on average sentences imposed in B for this crime be considered? What if under both states' laws

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[22] If Petitioner's argument were accepted the second state's interest would rarely be served because almost any defendant would plead guilty to a term of years rather than face a death sentence.

the defendant is a habitual offender? Under A's statutory scheme he received a life sentence, but in B the mandatory sentence is life without parole. Would the possibility of the defendant receiving parole in A give B an interest that would justify its prosecution? [23]

It is obvious that the application of an interest-based test is far more difficult than Petitioner suggests. In the somewhat limited area of state/state prosecutions the adoption of Petitioner's position would lead to a stream of questions, and cases, for this Court and the lower courts to decide. If the area of inquiry is expanded to the federal/state context, an area where this Court has noted the difficulty of a comparison of interests, *Bartkus v. Illinois*, 359 U.S. 121, 138 (1959),[24] overlapping territorial jurisdiction would give rise to a much greater number of such cases and questions.

Furthermore the confusion generated by the rejection of a clearly defined and logical rule of law and its replacement by murky language that must be clarified on a case by case basis will hinder thorough and effective law enforcement. Prosecutors may find it necessary to rush their cases to trial rather than risk being precluded under a uncertain test. Defense attorneys, gambling where the law is not clear that a second prosecution will be barred, may encourage their clients to plead guilty in the state giving their clients the best deal, and prosecutors may be anxious to make those deals, even

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[23] If the Court ventures into this analysis of interests, eventually it will be argued that the defendant's "interests" should be considered. Then the analysis will not only involve ascertaining the state's interests and determining whether they are satisfied, but also whether the state's unsatisfied interests outweigh the defendant's interests.

[24] As was argued above, an application of an analysis of interests in the state/state context would surely lead to the argument that it be applied in the federal/state context.

to lesser included offenses, rather than take a chance on being beaten to the courthouse by another state.[25]

In short, the confusion generated by the adoption of an interest test is sufficient reason in and of itself to reject Petitioner's argument.

II. EVEN IF THE DUAL SOVEREIGNTY DOCTRINE IS APPLIED TO SUCCESSIVE STATE PROSECUTIONS ONLY WHERE THE STATES HAVE DIFFERENT INTERESTS, PETITIONER'S CONVICTION AND SENTENCE SHOULD BE AFFIRMED BECAUSE ALABAMA HAS INTERESTS IN THE PROSECUTION WHICH ARE DIFFERENT FROM THOSE OF GEORGIA AND WHICH WERE NOT SATISFIED BY GEORGIA'S PROSECUTION.

Respondent has consistently maintained and continues to maintain that the sole question relevant to the application vel non of the dual sovereignty doctrine to successive prosecutions by two governments is whether or not each government derives its authority to prosecute from a source independent of the other government. If the sources of power are independent, then the governments are sovereigns in relation to one another and the dual sovereignty doctrine applies. In the case at bar each state has as the source of power its own organic law, *United States v. Wheeler*, 435 U.S. at 320; thus Alabama and Georgia are sovereigns and double jeopardy does not bar Alabama's prosecution and conviction of Petitioner.

If, however, this Court should apply the dual sovereignty doctrine to successive state prosecutions only where the interests of the second state are different from those of the first state or have not been satisfied by the first state's prosecution, then this Court should still affirm

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[25] In this sense guilty pleas would be encouraged. But extension of the present doctrine to the state/state situation would not discourage guilty pleas; the possibility of prosecution in a second state would have no effect on plea bargaining in a first state.

Petitioner's conviction and sentence because Alabama's interests in its prosecution of Petitioner are different from Georgia's and its interests were not satisfied by Georgia's prosecution.

Alabama has an interest in seeing that persons who violate its laws receive the degree of punishment provided under Alabama law. Petitioner was convicted of the capital offense of murder during a kidnapping in the first degree, which is punished either by death or life imprisonment without parole.[26] Ala. Code, § 13A-5-39(1) (Appendix). Thus upon conviction in Alabama Petitioner would necessarily receive a punishment greater than his life sentence in Georgia. Because Alabama's punishment is greater, its interest was not satisfied by Georgia's prosecution and sentence.

Alabama also has an interest in protecting its own residents from kidnapping and murder, in addition to its interest in protecting persons in general from such a crime. Georgia does not have a similar interest in protecting an Alabama resident such as Rebecca Heath. That Georgia's interest in this particular crime was not as great as Alabama's was demonstrated when Georgia allowed Petitioner, who had already made a full confession, to plead guilty to the lesser punishment for murder under its statute, life with parole eligibility. Ga. Code

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[26] Petitioner's Georgia crime, malice murder under Ga. Code 26-1101(a) (Appendix), is somewhat akin to intentional murder under Ala. Code § 13A-6-2(a)(1), which defines murder as intentionally causing the death of another person. The type of murder defined in § 13A-6-2 is the murder element of murder during a kidnapping in the first degree. Ala. Code § 13A-5-40(b) (Appendix). Whether "malice" murder in Georgia would be a lesser included offense of kidnapping/murder in Alabama is not clear. At times the Georgia courts seem to equate malice with intent. *Chandler v. State*, 230 Ga. 574, 198 S.E.2d 289 (1973). Elsewhere, however, malice is spoken of in terms of an "abandoned and malignant heart," *Davis v. State*, 237 Ga. 279, 227 S.E.2d 249 (1976); the relation between this and intent is in doubt.

§ 26-1101 (Appendix). Thus this Alabama interest was not satisfied by the Georgia prosecution.

That Alabama had an interest in Petitioner's prosecution different from Georgia's interest is also evidenced by the fact that Alabama sought and imposed the death penalty. This Court has previously recognized the "qualitative difference" between a sentence of death and a term of imprisonment. *Spaziano v. Florida*, 104 S.Ct. 3154, 3162 (1984). "There is no question that death as a punishment is unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.). "It is an extreme sanction, suitable to the most extreme of crimes." *Id.* Alabama made the decision that Petitioner's crime was among those "most extreme of crimes," and therefore asked for this punishment.[27] Georgia, while it could have insisted on the death penalty, with a full confession by Petitioner, did not; instead it allowed Petitioner to plead guilty to the lesser punishment. Georgia's decision, while perhaps appropriate for the Georgia crime, cannot be said to have satisfied Alabama's interest in imposing the death penalty for what Alabama considered an extreme crime.[28]

Because Alabama's interests both in the victim and in the particular type of crime were different from Georgia's and were not satisfied by Georgia's prosecution, the conviction and sentence of Petitioner in Alabama for his Alabama crime should be affirmed even under Petitioner's own interest analysis approach.

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[27] The preposterous suggestion (Petitioners' brief, p. 21) that Alabama prosecuted Petitioner because he asserted his Fifth Amendment rights is totally unsupported by the record.

[28] *Ciucci v. Illinois*, 356 U.S. 571 (1958), cited by Petitioner, leaves open the question of whether repeated prosecutions by *one* sovereign simply in order to impose a death sentence violates due process. It says nothing about a prosecution by a second sovereign where the sentence imposed by the first sovereign falls short of the minimum sentence under the laws of the second sovereign.

III. PETITIONER'S REPEATED ARGUMENTS AS TO ALABAMA'S JURISDICTION OVER PETITIONER'S CRIME DO NOT RELATE TO THE ISSUES BEFORE THE COURT AND ARE LEGALLY INCORRECT.

Throughout Petitioner's brief he attempts to show that Alabama did not have jurisdiction over his crime. Petitioner's argument is irrelevant to the issues before this Court, and is also legally incorrect.

In Issue I of his brief in support of petition for writ of certiorari, Petitioner first advanced this argument regarding jurisdiction. No question of jurisdiction was decided in the court below. *Ex parte Heath*, 455 So.2d 905 (Ala. 1984). This Court granted certiorari only as to Issue II of the petition, concerning the applicability vel non of the dual sovereignty doctrine to successive state prosecutions. That jurisdiction has no relation to that double jeopardy issue is shown by the fact that the question of Alabama's jurisdiction would have arisen regardless of whether Georgia had prosecuted. The question of jurisdiction is therefore not before this court.[29]

Furthermore, Alabama has jurisdiction of this crime. The Alabama offense for which Petitioner was tried and convicted was murder during a kidnapping in the first degree, which consists of two elements, murder and kidnapping. *See, Ex parte Baldwin*, 372 So.2d 32, 33 (1979). Alabama may prosecute a crime where it commences in

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[29] Because jurisdiction is not before this Court, *Nielsen v. Oregon*, 212 U.S. 315 (1909), which in dicta limits the jurisdiction of adjoining states, is not pertinent. Petitioner's hypothetical situation (Petitioner's brief, p. 16) of six states prosecuting for the same kidnapping/murder is also irrelevant. To the extent that it concerns the limits of a state's criminal jurisdiction it does not relate to the issue before the Court. To the extent that it concerns double jeopardy it is also irrelevant to this case because six states are not prosecuting here, only two. In *Moore, Lanza, Abbate*, and *Wheeler* this Court has already determined that two governments may prosecute provided they are separate sovereigns.

Alabama and is consummated in another state. Ala. Code § 15-2-3 (Appendix). Because the crime commenced in Alabama Petitioner was properly tried and convicted in Alabama.

CONCLUSION

Respondent respectfully requests this Court to hold that Petitioner's double jeopardy rights were not violated by his prosecution and conviction in Alabama for the Alabama offense of murder during a kidnapping in the first degree after prosecution in Georgia for the Georgia offense of malice murder, and to affirm Petitioner's conviction and sentence in Alabama.

Respectfully submitted,

CHARLES A. GRADDICK
Alabama Attorney General

WILLIAM D. LITTLE *
Alabama Assistant
Attorney General
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

Counsel for Respondent

* Counsel of Record

APPENDIX

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Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment, provides in part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

Ala. Code, § 13A-5-39(1) provides:

> (1) CAPITAL OFFENSE. An offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provisions of this article.

Ala. Code, § 13A-5-40 provides:

> (a) The following are capital offenses:
>
> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;
>
> (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;
>
> (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;
>
> (4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;
>
> (5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is

on duty or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contact or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall

include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in section 13A-6-2(a)(1), but not as defined in section 13A-6-2(a)(2) and (3). Subject to the provisions of section 13A-5-41, murder as defined in section 13A-6-2(a)(2) and (3), as well as murder as defined in section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under section 13A-2-23. When the defendant's guilt of that other crime is

established under section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section.

Ala. Code, § 13A-6-2 provides:

(a) A person commits the crime of murder if:

(1) With intent to cause death of another person, he causes the death of that person or of another person; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by article 2 of chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by article 2 of chapter 5 of this title or any amendments thereto.

Ala. Code, § 15-2-3 provides:

When commission of an offense commenced in the state of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law.

Ga. Code § 26-1101 provides:

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.